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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MONSANTO COMPANY
Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For the Seventh Circuit

BRIEF FOR FORTY-SIX STATES AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

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I.
INTRODUCTION

The States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts and Pennsylvania, and the District of Columbia (hereinafter the "Amici States") submit this brief in support of Respondent Spray-Rite Service Corporation.

II

IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of their respective states' antitrust laws, and of the federal antitrust laws.¹ In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens.² The Corporation Counsel for the District of Columbia has the same duties and authority with

1 Pennsylvania does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

2 15 U.S.C. 4C

respect to the District of Columbia.

B. Interest Of The Amici States In This Case

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's numerous pronouncements with respect thereto.

Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.³

³ See, e.g., People v. North Avenue Furniture & Appliance, 645 P.2d 1291 (Colo 1982); Neyens v. Roth, 326 N.W.2d 294 (Iowa 1982); Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473 (Wisc. 1980); Marin County Bd. of Realtors v. Palsson, 130 Cal.Rptr. 1, 549 P.2d 833 (Calif. 1976); State v. Readers Digest Assoc., 81 Wn.2d 259, 501 P.2d 290 (1972); Pittsburg Plate Glass Co. v. Paine & Nixon Co., 234 N.W. 453 (Minn. 1931).

For these reasons the Amici States oppose the contentions of Monsanto and the United States that resale price maintenance schemes should not be treated as per se violations. These contentions are antithetical to the Amici States' interest in sound antitrust policy and effective enforcement of the antitrust laws, and are inimical to pending cases and investigations involving resale price maintenance schemes.

III
SUMMARY OF ARGUMENT

1. The economic theories now advanced as justifications for abandoning the per se treatment of resale price maintenance schemes do not remotely justify such action. The competitive dangers presented by resale price maintenance far outweigh the theoretical justifications and assumptions relied upon by Monsanto and the United States, many of which have already been rejected by the Court. The dangers are many. Resale price maintenance facilitates horizontal price fixing, at both the manufacturer level and at subsequent levels in the chain of distribution. It results in higher prices, protects inefficiency and misallocates resources. It limits the free exercise of business judgment by independent distributors and dealers, and inhibits their ability to respond to the immediate competitive

demands of their markets. It also eliminates the choice of consumers as to the price premiums they are willing to pay for dealer services, while at the same time providing no guarantee that the services presumed to follow from resale price maintenance will indeed materialize.⁴ In addition, there are numerous alternatives unrelated to price now available to manufacturers as a means of addressing the marketing objectives allegedly enhanced by resale price maintenance.⁵

Moreover, it is apparent from the legislative history of the Sherman Act and the Court's decisions thereunder that the consistent application of the *per se* rule to resale price maintenance has not been mechanical and unthinking. Rather, it reflects due regard for the broad range of policy considerations--the

4 See *infra* pp. 44-53.

5 See *infra* pp. 53-56.

social and political as well as the economic--underlying the Sherman Act's fundamental democratic purpose of preserving economic opportunities and unfettered competition in all sectors of the economy at all levels of distribution.⁶

For similar reasons, the Court has consistently rejected proffered justifications for price fixing based on alleged pro-competitive effects and economic theory. This refusal to "ramble through the fields of economic theory" serves well the underlying enforcement purposes of the Act, and reflects the Court's awareness of the virtual futility of undertaking an exhaustive analysis of economic theories and assumptions which are not capable of objective and meaningful measurement, and which ultimately require a choice between rival theories.⁷

6 See *infra* pp. 9-31.

7 See *infra* pp. 31-44.

2. Even a record as sparse as that hypothesized by Monsanto could, in the context of a dealer termination case based on a claim of collusive resale price maintenance, justify a jury's inference of conspiracy. The absence of certain evidence in such a case could itself justify such an inference.⁸

⁸ See *infra* pp. 58-65.

IV

ARGUMENT:

THE AMALGAM OF POLICY CONSIDERATIONS
UNDERLYING THE SHERMAN ACT--THE SOCIAL
AND POLITICAL AS WELL AS THE
ECONOMIC--MANDATE CONTINUED
APPLICATION OF THE PER SE RULE
TO RESALE PRICE MAINTENANCE

A. The Conclusive Presumption Of
Illegality Applied To Inherently
Anticompetitive Acts And Practices--The
Per Se Rule--Was Articulated By This
Court Seventy Years Ago. The Rule Has
Since Been Regularly And Consistently
Applied By The Court To Such Conduct.

1. Origin Of The Per Se Rule

The per se rule is simply a conclusive presumption of illegality under §1 of the Sherman Act. The doctrine was first articulated by this Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Referring to the Court's earlier decisions in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), and United States v. Joint-Traffic Association, 171 U.S. 505 (1898), Justice White held that the decisions in those cases

[w]hen rightfully appreciated, were therefore this, and nothing more: That as considering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute ... That is to say, the cases but decided that the nature and character of the contracts [created] a conclusive presumption which brought them within the statute

221 U.S. at 65.

Similar language was employed sixty years later when Justice Marshall, speaking for the Court in United States v. Topco Associates, 405 U.S. 596 (1972), quoted from Justice Black's decision in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958), to explain the per se doctrine:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal... .

405 U.S. at 607.

See also Arizona v. Maricopa County Medical Society, __U.S.__, 73 L.Ed. 2d 48, 59 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 n. 9 (1980); and Broadcast Music, Inc. v. C.B.S., 441 U.S. 1, 8 (1979).

The presumption that certain acts and practices have a pernicious effect on competition and lack any redeeming virtue--i.e., are illegal per se--reflects the Court's conclusion that as a result of their inherent nature or necessary effect, Thomsen v. Cayser, 243 U.S. 66, 84-85 (1917), Nash v. United States, 229 U.S. 373, 376 (1913), United States v. American Tobacco Co., 221 U.S. 106, 179 (1911), or because of their evident purpose, American Tobacco, 221 U.S. at 179, they are plainly anticompetitive, Broadcast Music, 441 U.S. at 8, National Society of Professional Engineers v. United States,

435 U.S. 679, 692 (1970), and invariably operate to the prejudice of the public interest by unduly restraining competition, Nash v. United States, 229 U.S. at 376, American Tobacco, 221 U.S. at 179. ⁹

Since first announced in the seminal Standard Oil decision, the conclusive presumption of the per se rule has been steadfastly adhered to and frequently reiterated, most recently in Maricopa County, 73 L.Ed.2d at 59. See also, e.g., Broadcast Music, 441 U.S. at 8; and Topco Associates, 405 U.S. at 607.

⁹ See also Maricopa County, 73 L.Ed.2d at 58 and 59; Albrecht v. The Herald Co., 390 U.S. 145, 154 (concurring opinion of Justice Douglas, referring to "conspicuously unreasonable" conduct); United States v. Sealy, 388 U.S. 350, 355 (1967); and Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964) (referring to certain acts' "inexorable potentiality for and even certainty in destroying competition").

2. The Per Se Rule Applies To All Forms Of Price Fixing, Including Resale Price Maintenance.

The polestar of the antitrust laws is that price fixing, in whatever form, is a per se violation of the Sherman Act. On no antitrust subject has the Court spoken with greater frequency and resolve. In 1940, Justice Douglas, speaking for the Court in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), stated:

Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act

310 U.S. at 218.

Forty-two years later, after discussing the Court's price fixing decisions over the preceding eighty-four year period, ¹⁰ Justice Stevens stated

¹⁰ Catalano, 446 U.S. 643; Topco Associates, 405 U.S. 596; Albrecht v. The Herald, 390 U.S. 145; Northern Pacific Railway, 356 U.S. 50; Kiefer-Stewart v. Seagram, 340 U.S. 211 (1950); Socony-Vacuum, 310 U.S. 150; United States

for the Court in Maricopa County that "[w]e have not wavered in our enforcement of the per se rule against price fixing." 73 L.Ed.2d at 61.

The per se rule has historically proscribed resale price maintenance as well as other forms of price manipulation. Indeed, resale price maintenance was specifically characterized as violative behavior from the very inception of the Sherman Act itself. During consideration of the bill by the House Of Representatives, Representative Culberson of the House Committee On The Judiciary reported the act favorably from the Committee, and in doing so, identified resale price maintenance as an activity that would violate the act. 21 Cong. Rec., 51st. Cong., 1st. Sess., 4089 (1890);

v. Trenton Potteries Co., 273 U.S. 392 (1927); Standard Oil, 221 U.S. 1; and Joint-Traffic Association, 171 U.S. 505.

Walker, History Of The Sherman Act, pp. 35-36 (1910).¹¹

Acting on the Congressional mandate, this Court, from its earliest decision on the subject, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), to its most recent discussion thereof, Rice v. Norman Williams Co., __ U.S. __, 73 L.Ed.2d 1042 (1982), has regularly and consistently condemned resale price maintenance agreements as per se violations of the Sherman Act. By 1956, Chief Justice Warren, speaking of the price maintenance conduct in United States v. McKesson & Robbins, 351 U.S. 305 (1965), was able to state that:

It has been held too often to require elaboration now that

11 See also 21 Cong. Rec., 51st. Cong., 1st. Sess., 4098 (1890) (remarks of Representative Taylor: "... if the conscience of the retailer is touched and he reduces his price the trust steps on him and refuses to sell to him or undersells him till he is ruined").

price fixing is contrary to the policy of competition underlying the Sherman Act....

351 U.S. at 309-310.

In Albrecht v. The Herald, Justice White, citing the Court's previous decisions in Trenton Potteries, Socony-Vacuum, Kiefer-Stewart, and McKesson & Robbins, referred to "the long-accepted rule in §1 cases that resale price fixing is a per se violation of the law whether done by agreement or combination." 390 U.S. at 151-152. The Court's steadfast condemnation of such schemes was reiterated by Justice Powell in California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980):

The Court has ruled consistently that resale price maintenance illegally restrains trade. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407, 55 L.Ed. 502, 31 S.Ct. 376 (1911), the Court observed that such arrangements are 'designed to maintain prices ... , and to

prevent competition among those who trade in [competing goods]. See Albrecht v. The Herald Co. 390 U.S. 145, 19 L.Ed.2d 998, 88 S.Ct. 869 (1968); United States v. Park, Davis & Co. 362 U.S. 29, 4 L.Ed.2d 505, 80 S.Ct. 503 (1960); United States v. A. Schrader's Son, Inc. 252 U.S. 85, 64 L.Ed. 471, 40 S.Ct. 251 (1920).

. . .

As Mr. Justice Hughes pointed out in Dr. Miles, such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions ... by agreement with each other.'

445 U.S. at 102-103.¹²

12 See also Norman Williams, 73 L.Ed.2d at 1050 (Justice Rehnquist describing resale price maintenance as "an activity that has long been regarded as a per se violation"); Sealy, 388 U.S. at 355 ([resale price maintenance schemes'] anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in light of the rule of reason"); Simpson, 377 U.S. at 17; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458 (1940) ("agreements for price maintenance ... are, without more, unreasonable

Monsanto's reliance upon Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), is unavailing. The Court expressly removed price-related vertical restrictions, i.e. resale price maintenance, from the scope of that decision:

As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. ... [U]nlike nonprice restrictions, '[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much

restraints within the meaning of the Sherman Act because they eliminate competition ... "); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922) (price maintenance "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition ... "). Cf., United States v. Colgate & Co., 250 U.S. 300 (1919).

between that product and competing brands.'

433 U.S. at 51, note 18.

Congress recently expressed its approval of the per se treatment of price maintenance schemes by enacting the Consumer Goods Pricing Act of 1975,¹³ which repealed the Miller-Tydings and McGuire Acts under which resale price maintenance had previously been allowed at the option of individual states through the enactment of state fair trade laws. See California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 102-103 (1980); and Continental TV. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n. 18 (1977). The legislative history of the Consumer Goods Pricing Act is replete with references to the per se rule and the Court's application of the rule to price maintenance cases.¹⁴

¹³ P.L. 94-145, 89 Stat. 801, amending 15 U.S.C. § 1, 45 (a).

For a resale price program to avoid per se condemnation, the narrow path marked by Colgate and its progeny¹⁵ is clear. If a manufacturer or distributor, for its own business reasons and through the exercise of its independent business discretion, unilaterally adopts and implements a program of suggested resale prices, it may do so. It can announce in advance of any sales to subsequent sellers its policy of selling only to

14 See, e.g., Fair Trade, Hearings Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary, House Of Representatives, 94th Cong., 1st Sess. (1975) (remarks of Representative Peter J. Rodino Jr., Chairman Of The House Judiciary Committee, at p.1: "[a]greements ... to maintain prices are classic restraints of trade. They have long been considered per se illegal under our antitrust laws."). See also H. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975) (reporting that price maintenance agreements are per se illegal under the Sherman Act).

15 See Parke, Davis, 362 U.S. at 43-45; Bausch & Lomb, 321 U.S. at 721 and 723; Beech-Nut Packing Co., 257 U.S. at 452-453; A. Schrader's Son, 252 U.S. at 99; and Colgate, 250 U.S. at 306-307.

those who resell at the suggested prices, and it can unilaterally refuse to make further sales to resellers who, for their own independent reasons, choose not to follow the suggested price. The key to the legitimacy of any suggested resale price program is the absolute preservation of resellers' freedom to conduct at all times their business, in their market and subject to their competitive conditions, in whatever manner they deem appropriate, including the freedom to sell at, below, or above the suggested resale prices. Any arrangement which impairs this choice of action is beyond the pale. An agreement, whether express, implied from a course of dealing or other circumstances, or imposed through coercion or intimidation, which undertakes to secure adherence to suggested prices violates the act.

3. The Per Se Rule Reflects Fundamental Social And Political, As Well As Economic, Considerations.

Speaking for the Court in Northern Pacific Railway, Justice Black described the spirit and purpose of the Sherman Act as follows:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

356 U.S. at 4.

This melding of social, political and economic concerns was similarly described by Justice Marshall in Topco Associates:

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill Of Rights is to the

protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete--to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

405 U.S. at 610.

These democratic tenets of the Sherman Act are reflected in its legislative history. In the words of Senator Sherman, "[i]t is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec., 51st. Cong., 1st Sess., 2457 (1890). The Senator also remarked that:

This bill is only an honest effort to declare a rule of action ... Although this body is always conservative, yet, whatever may be said of it, it has always been ready to preserve, not only popular

rights in their broad sense, but the rights of individuals as against associated and corporate wealth and power.

Id. at 2460.

The Court has been vigilant in preserving these liberties. It has steadfastly condemned conduct which inhibits access to or the freedom of discretion within channels of commerce. The Court's regard for the democratic precepts underlying the Act are reflected in Justice Peckham's concern for the displacement of small businesses in Trans-Missouri Freight Association:

[T]he result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent

business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation and bound to obey orders issued by others.

166 U.S. at 324.

The specific liberty threatened has frequently been the ability to establish unilaterally the prices at which one will sell a commodity or service. Thus, for example, Justice Black, in striking down the price maintenance program in Kiefer-Stewart, stated that such programs "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U.S. at 213. Similarly, the Court concluded that the price maintenance scheme at issue in Simpson v. Union Oil violated the Sherman Act by "depriving independent dealers of the exercise of free judgment whether ... to sell at competitive prices." 377 U.S. at 16. Writing for the Court, Justice Douglas

observed that:

Dealers, like Simpson, are independent businessmen Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil.

377 U.S. at 20.

Justice White wrote in Albrecht

v. The Herald that:

[S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition ... is not cast in a single mold.

390 U.S. at 152.

See also Maricopa County, 73 L.Ed.2d at 60-61; and Topco Associates, 405 U.S. at 610-611.

It is evident from the legislative history of the Sherman Act and the case law construing it that the underlying emphasis upon social and political, as

well as economic concerns reflects both an appreciation of human nature and human aspirations and the fundamental democratic purpose of the Act--the protection of commercial institutions, large or small, in any sector of our economy, from the potential abuse of economic power in whatever form. The very acquisition of such power, in and of itself--whether actually abused or merely reposing in a benign or dormant state--is the evil at which the Sherman Act strikes.

Speaking for the Court in Trenton Potteries, Justice Stone addressed the potential abuse of power as follows:

The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices Agreements which create such potential power may well be held in themselves unreasonable or unlawful restraints

273 U.S. at 397.

Justice Stone subsequently addressed

the same subject in Ethyl Gasoline. With reference to Ethyl's accumulation of "vast potential power" "capable of use" as a means of controlling distributors' prices, 309 U.S. at 452-453 and 457, he wrote:

Agreements for price maintenance ... are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . and agreements which create potential power for such price maintenance exhibited by its actual execution for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, which is not only a prohibition against the infliction of a particular type of public injury but a 'limitation of rights which may be pushed to evil consequences and therefore restrained.' Standard Sanitary Mfg. Co. v. United States, ... 226 U.S. 49 [1912]

309 U.S. at 458.

Concern over the potential abuse of economic power was most recently reiterated by Justice Stevens in Maricopa County:

[Respondents' reliance upon pro-competitive justifications] indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation

73 L.Ed.2d at 63.¹⁶

16 See also, e.g., Socony-Vacuum, 310 U.S. at 221 ("[T]hose who control the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy and drastically impair the competitive system."), 224 ("price-fixing agreements may have utility to members of the group though the power possessed or exerted falls short of domination and control"), and 224 n. 59 ("[price-fixing agreements] are all banned because of their actual or potential threat to the central nervous system of the economy"); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) ("the most cogent evidence that they had this power ... ") and 238 ("its tendency was certainly to give the defendants the power to charge unreasonable prices, had they chosen to do so"); and Trans-Missouri Freight Association, 166 U.S. at 324 ("[i]n this light, it is not material that the price of an article may be lower. It is the power of the combination to raise it").

The need to curb such power because of its potential for abuse and its inevitable anticompetitive tendency was evident from common law experience long antedating the Sherman Act, 21 Cong. Rec. 2456 and 2457 (1890), National Society of Professional Engineers, 435 U.S. at 688, and was frequently referred to in the remarks of Senator Sherman when the bill was presented, 21 Cong. Rec. 2456-2459 (1890).

B. Due To The Inevitably Anticompetitive Effect Of Price Fixing Schemes, This Court Has Regularly And Consistently Rejected Justifications Based On Pro-Competitive And Economic Arguments

1. Throughout The History Of The Per Se Rule, Justifications Based On Alleged Pro-Competitive Effects And Economic Arguments Have Been Interposed As Defenses For Price Fixing Activities. The Justifications Have Been Routinely Rejected.

In recognition of the inherently anticompetitive effect of price fixing schemes, and the crucial, all-sensitive

role price plays in the competitive system mandated by the Sherman Act,¹⁷ this Court has historically rejected proffered justifications based on pro-competitive arguments and economic abstractions, hypotheses and conjecture. Such attempts at justification have been numerous, including the promotion of competition;¹⁸ elimination of the evils of "ruinous" competition;¹⁹ that the prices fixed are fair and reasonable;²⁰

17 Price is "the central nervous system of the economy." Broadcast Music, Inc. v. C.B.S., 441 U.S. 1, 23 (1979); National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59 (1940).

18 Topco Associates, 405 U.S. at 610.

19 Maricopa County, 73 L.Ed.2d at 62; Socony-Vacuum, 310 U.S. at 220; Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 42 (1912); Addyston Pipe, 175 U.S. at 235; Joint-Traffic Association, 171 U.S. at 576; Trans-Missouri Freight Association, 166 U.S. at 321.

20 Maricopa County, 73 L.Ed.2d at 59 and 62; McKesson-Robbins, 351 U.S. at 309-310; Trenton Potteries, 273 U.S. at 397-398; American Column & Lumber Co. v. United

that the unique competitive environment of a particular trade, profession or industry requires liberal treatment under the law,²¹ or that a given level in the chain of distribution requires such treatment;²² that the latest and best economic theories justify the restraint;²³ and that the parties intentions or motives were good.²⁴ All have been rejected.

States, 257 U.S. 377, 409-410 (1921); Trans-Missouri Freight Association, 166 U.S. at 331 and 341.

- 21 Maricopa County, 73 L.Ed.2d at 62; National Society of Professional Engineers, 435 U.S. at 689; Socony-Vacuum, 310 U.S. at 222 and 329-330.
- 22 American Column & Lumber, 257 U.S. at 400-401; Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 613 (1914).
- 23 Trenton Potteries, 273 U.S. at 397; Trans-Missouri Freight Association, 166 U.S. at 321.
- 24 Topco Associates, 405 U.S. at 610; McKesson & Robbins, 351 U.S. at 310; Thomsen v. Cayser, 243 U.S. at 85; Standard Sanitary Mfg. Co., 226 U.S. at 49; and Trans-Missouri Freight Association, 166 U.S. at 341.

Describing these proffered justifications as "typical of the protestations usually made in price-fixing cases," Justice Douglas stated in Socony-Vacuum:

[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

310 U.S. at 218.

The court subsequently reiterated this principle in Topco Associates:

[T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.

405 U.S. at 610.

See also McKesson & Robbins, 351 U.S. at 309-310.

2. The Rejection Of Economic Justifications Reflects The Futility Of Undertaking An Analysis Of Inherently Anticompetitive Conduct, And Serves Well The Underlying Enforcement Purposes Of The Per Se Rule.

The Court has long recognized the virtual futility of analyzing proffered justifications based on alleged pro-competitive effects, the reasonableness of the prices involved, and other economic theories and assumptions. Abstractions of this nature are simply not capable of measurement in any meaningful or objective sense, and do not remotely justify undercutting the certainty and security provided by the per se rule. This was clearly expressed by Justice Black in Northern Pacific Railway:

[The] principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for

an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken.

356 U.S. at 5. See also Maricopa County, 73 L.Ed.2d at 62-63.

The same principle was articulated by Justice Marshall in Topco Associates:

The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.

405 U.S. at 609-610.

In short, the Court has been singularly disinclined over the years to "ramble through the fields of economic theory," Topco Associates, 405 U.S. at 609 n. 10, endeavoring to make absolute

and concrete that which is by nature abstract, illusive and theoretical. Such an exercise would be fraught with great uncertainties, Trans-Missouri Freight Association, 166 U.S. at 331, and multi-faceted and forever changing competitive environments, Socony-Vacuum, 310 U.S. at 221, and would necessitate an exhaustive analysis of our economic organization and a choice between rival economic philosophies, Trenton Potteries, 273 U.S. at 398. Such complications present "a problem that no human ingenuity could solve." International Harvester Co. v. Kentucky, 234 U.S. 216, 223 (1914). As Justice Holmes therein observed:

[T]he elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community ... has to be supposed differently organized and subject to other influences than those under which it acts.

Id. at 223.

Moreover, the Court has long been cognizant of the adverse enforcement consequences of such economic gymnastics. Eighty-six years ago, in the Courts' opinion in Trans-Missouri Freight Association, Justice White remarked that:

It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the road itself in all his future dealings with it.

166 U.S. at 332.

As fundamentally, the very undertaking of such an appraisal would

dramatically alter the goal of the Sherman Act--economic freedom.

In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Socony-Vacuum, 310 U.S. at 221.

Thus, it is now firmly established that economic second-guessing as to the expediency of any particular price fixing scheme, or the wisdom of the Sherman Act itself, will not remove such activities from per se condemnation under the Act. Maricopa County, 73 L.Ed.2d at 60; National Society of Professional Engineers, 435 U.S. at 690; Trenton Potteries, 273 U.S. at 399; and Standard Oil, 221 U.S. at 65. Such questions, requiring, as they do, the substitution of judicial wisdom for the clear mandate of the act, Standard Oil, 221 U.S. at 65, are simply not open for resolution by the

courts, Thomsen v. Cayser, 243 U.S. at 85, Standard Sanitary Mfg., 226 U.S. at 49, Addyston Pipe, 175 U.S. at 238. As stated in Socony-Vacuum, "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." 310 U.S. at 221. See also McKesson & Robbins, 351 U.S. at 310.

In the words of Justice Stone:

[F]or whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

273 U.S. at 397.

In short, economic arguments and theories submitted to the Court are misdirected. As stated in McKesson & Robbins:

We need not concern ourselves with such speculation. Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy.

351 U.S. at 316.

See also Simpson v. Union Oil, 377 U.S. at 17; and Northern Pacific Railway, 356 U.S. at 4.

Moreover, there are major benefits which stem from application of the per se rule's conclusive presumption of illegality and the attendant rejection of justifications based on economic abstractions: certainty as to the illegality of price fixing schemes and elimination of the need for complex and prolonged--and so often futile--economic analysis of entire industries in order to determine the effect of such activities. Maricopa County, 73 L.Ed.2d at 58; Broadcast Music, 441 U.S. at 8 n. 11;

Topco Associates, 405 U.S. at 609 n. 10;
Northern Pacific Railway, 356 U.S. at 5.
The per se rule is thus a valid and
useful tool of antitrust policy and
enforcement. Broadcast Music, 441
U.S. at 8.

Application of the rule may
occasionally condemn price manipulation
programs which, under some scenario,
might enhance competition. Reality, on
occasion, may appear to conflict with the
public interest. Topco Associates, 405
U.S. at 612-613 (concurring opinion of
Justice Blackmun). Such anomalies,
however, are inevitable under any broad
statutory scheme.²⁵ As Justice Stevens
observed in Maricopa County:

25 See Ethyl Gasoline, 309 U.S. at 461
("the decree rightfully suppressed
[the licensing device] even though
it had been or might continue to be
used for some lawful purpose");
Trans-Missouri Freight Association,
166 U.S. at 337 ("no law can be
enacted ... for the control of
human affairs that in its
enforcement does not produce some
evil results").

As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable.

73 L.Ed.2d at 58.

Application of the rule is a matter of balancing the advantages of the rule and the protection thereby afforded against the likelihood of anomalous application. The former outweighs the latter by a substantial margin.

Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977).

See also Maricopa County, 73 L.Ed.2d at 58-59 n. 16 and 63 ("Those claims of enhanced competition are so unlikely to

prove significant in any particular case that we adhere to the rule of law that is justified in its general application.").

3. The Court Has Previously Rejected The "Traditional" Justifications For Resale Price Maintenance Now Advanced By Monsanto And The United States. It Has Properly Concluded That The Competitive Dangers Of Resale Price Maintenance Substantially Outweigh The Theoretical Advantages.

The justifications for resale price maintenance now advanced are neither new nor unique. In rejecting the price maintenance scheme involved in Simpson v. Union Oil, the Court was mindful of the justifications "traditionally advanced for resale price maintenance," i.e., the need to protect dealers' profit margins, the need to maintain dealers' reputations as people handling premium quality products, and the need to maintain a "competitive relationship" between dealers' prices and the prices of competitors. 377 U.S. at 19 n. 6. In

Albrecht v. The Herald, the Court, after remarking upon the inconclusive nature of empirical data on the subject, recognized "as a theoretical matter" certain situations in which a manufacturer would regard price maintenance to be in its interests, including the need to assure dealer services, advertising and promotion. 390 U.S. at 151 n. 7. Justice Harlan's dissent²⁶ in that case summarily rejected justifications now offered by Monsanto:

Resale price maintenance ... lessens horizontal intrabrand competition. The effects, higher prices, less efficient use of resources, and an easier life for the resellers, are the same whether the price maintenance policy takes the form of a horizontal conspiracy among resellers or of vertical dictation by a manufacturer plus reseller acquiescence. This means two things. First, it is frequently possible to infer a combination of resellers behind what is presented to the world as a

26 Justice Harlan dissented on the issue of maximum, rather than minimum, price maintenance.

vertical and unilateral price policy, because it is the resellers and not the manufacturer who reap the direct benefits of the policy. Second, price floors are properly considered per se restraints, in the sense that once a combination to create them has been demonstrated, no proffered justification is an acceptable defense. Following the rule of reason, combinations to fix price floors are invariably unreasonable: to the extent that they achieve their objective, they act to the direct detriment of the public interest as viewed in the Sherman Act. In the absence of countervailing fair trade laws, all asserted justifications are, upon examination, found wanting, either because they are too trivial or elusive to warrant the expense of a trial ... or because they run counter to the Sherman Act premises

390 U.S. at 157.

In light of the broad spectrum of policy considerations underlying the Sherman Act--the social and political as well as the economic--and the policy, rationale and enforcement advantages of the per se rule, it is evident that on

balance, the threat to competition presented by price maintenance programs far outweighs the theoretical justifications offered by Monsanto and disciples of the "Chicago school"²⁷ of economic thought.²⁸ Unfettered competition is the mandated standard against which such rarefied theories are to be judged, and that standard condemns resale price maintenance because of the dangers to our competitive system thereby presented. The dangers are numerous.

First, price maintenance facilitates the creation, implementation and enforcement of horizontal price fixing conspiracies, both at the manufacturing level²⁹ and at subsequent levels in the

27 See, Litvack, Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division, 60 Texas L. Rev. 649 (1982); Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925 (1975).

28 See Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Columbia L. Rev. 1, 2 (1978).

chain of distribution, i.e., wholesale and retail.³⁰ Under the guise of resale price maintenance, the opportunity for manufacturer collusion with other manufacturers, or for the collusive involvement of manufacturers in collusion between its distributors or dealers, is increased substantially, complete with a built-in means of policing and rigid enforcement. Moreover, in industries involving relatively few manufacturers, price maintenance enhances the manufacturers' ability to maintain

29 See, e.g., B.S.Yamey, Resale Price Maintenance 10-12 (B.S. Yamey ed. 1966); Comanor, Vertical Territorial and Customer Restrictions: White Motor and its Aftermath, 81 Harv. L. Rev. 1419, 1426 (1968); Levmore, Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information, 67 Iowa L. Rev. 981, 986 (1982).

30 See, e.g., L. Sullivan, Handbook of the Law of Antitrust 383 (1977); Andersen, The Antitrust Consequences of Manufacturer-Suggested Retail Prices--The Case for Presumptive Illegality, 54 U. Wash. L. Rev. 763, 785 (1979).

"imperfect competition." See Simpson v. Union Oil, 377 U.S. at 22 n. 9.

Second, price maintenance raises prices. The experience with fair trade laws, which previously allowed price maintenance under the Miller-Tydings and McGuire Acts, cost the consuming public literally billions of dollars in higher prices.³¹ A Department of Justice study indicates that resale price maintenance under the fair trade laws cost consumers in excess of \$2 billion a year; and another Department study estimates the fair trade laws increased prices by 18%-27%.³² International experience reveals the same consequences.³³

Third, the price uniformity

31 H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3-4 n. 11 (1975), and S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 n. 12 (1975).

32 1975 U.S. Code Cong. & Ad. News 1569, 1572

33 See note 31. See also, B. S. Yamey, supra, at 3; Comanor, supra, at 1437; S. Hollander, Resale Price Maintenance 67, 85, 96 (B. S. Yamey ed. 1966).

resulting from resale price maintenance protects inefficient distribution systems by insulating manufacturers, distributors and dealers from the competitive demands for efficiency, innovation and service.³⁴

Fourth, the resale prices set by a distant manufacturer pursuant to price maintenance programs are inherently less responsive to the immediate demands of local markets than prices determined by distributors and dealers whose very existence and livelihood depend upon price flexibility to meet those demands. Price maintenance programs place the distributors and dealers at the mercy of manufacturers, and replace their independent business judgment with the less sensitive and perhaps erroneous judgment of the manufacturer. The goals and interests of the two are not coextensive. Each operates at a

³⁴ See, e.g., B. S. Yamey, supra, at 4, 5; Comanor, supra, at 1434; L. Sullivan, supra, at 381.

different level of distribution, and the distributors and dealers need at all times the freedom to respond to the unique competitive demands of their respective markets, as interpreted by them, in accordance with their independent business judgment.³⁵

Fifth, price maintenance limits--indeed, eliminates-- the choice of consumers as to the price premiums they are willing to pay for the services and prestige theoretically made possible by price maintenance programs.³⁶

Finally, there is simply no guarantee that resale price maintenance will truly increase dealer services as

35 See, e.g., L. Sullivan, supra, at 377, 382, 387, 388; Andersen, supra, at 780.

36 See, e.g., B. S. Yamey, supra, at 3, 13; Gerhart, The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis, 1981 Duke Law J. 417, 435 (1981); Comanor, supra, at 1430; Andersen, supra, at 788; S. Hollander, Restraints Upon Retail Competition 13 (1965).

its proponents, on the basis of theoretical assumptions, anticipate.³⁷

These dangers clearly mandate recourse to the numerous alternatives unrelated to resale prices now available to manufacturers as a means of addressing the marketing concerns which the

³⁷ See, e.g., Gerhart, supra, at 431-432; B. S. Yamey, supra, at 14; Stewart and Roberts, Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?, 58 Wash. U. L. Q. 727, 755 (1980). There is a more plausible explanation for a manufacturer imposing resale prices--resale price maintenance allows a manufacturer to maintain at a higher level the wholesale prices it charges its dealers. By employing resale price maintenance, a manufacturer who has differentiated its product from that of a competitor, perhaps only through name brand recognition, is able to protect its dealers' profit margins, i.e., the difference between wholesale and resale prices. Without this protection, intrabrand price competition might reduce dealer margins to the extent that it becomes unprofitable for the dealer to carry the manufacturer's product. By insulating its dealers from intrabrand price competition, a manufacturer is able to maintain higher wholesale prices, all at the expense of the consuming public.

proponents of price maintenance advance as justifications for such programs.

First, manufacturers can integrate vertically, and directly accomplish that which the proponents would accomplish by indirection.³⁸

Second, they can, through contracts, impose upon their distributors and dealers objective standards relating to sales volume, service, advertising and promotion, good will and prestige by which their performance will be judged, and their contracts either renewed or terminated.³⁹

Third, they can adopt a distribution program based on true agency or consignment relationships.⁴⁰

38 See, e.g., Comanor, supra, at 1435; L. Sullivan, supra, at 380; Levmore, supra, at 983.

39 See, e.g., B. S. Yamey, supra, at 9, 14; L. Sullivan, supra, at 386.

40 See, e.g., United States v. General Electric Co., 272 U.S. 476 (1926). See also Sullivan, supra, at 388, 389 (distinguishing General Electric and Simpson v. Union Oil Co., 377 U.S. 13 (1964) and detailing the

Fourth, manufacturers can themselves deal directly with the marketing concerns most frequently advanced as justifications for price maintenance. If a manufacturer wants to insure a certain level of service, promotion and advertising, it can undertake such activities itself on behalf of its distributors and dealers, and/or directly reimburse its distributors and dealers for the expense thereof.⁴¹ If a manufacturer seeks to enhance the "prestige" of its product through price alone, it can simply raise the price to its distributors and dealers.⁴²

Moreover, regardless of recourse to any such alternatives, a manufacturer can nonetheless adopt a sales program in

methods by which a manufacturer could legally further such a relationship).

41 See, e.g., B. S. Yamey, *supra*, at 14; Andersen, *supra*, at 788; Levmore, *supra*, at 983, 987; Gerhart, *supra*, at 433.

42 L. Sullivan, *supra*, at 377, 386.

accordance with the course charted by Colgate and its progeny.⁴³ If adopted as a result of a truly independent, unilateral business decision, and administered as such, a manufacturer will, if the benefits of price maintenance are as real as its proponents would have one believe, be able to fulfill its resale price goals.⁴⁴

C. Any Change In The Scope And Application Of The Per Se Rule Is A Matter For Action By The Congress.

If a change in the scope or application of the per se rule is to be made, the nature and extent of the change is a matter for action by the Congress.

As emphasized in Maricopa County:

Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business

43 See note 15.

44 Indeed, the failure of such a program--whether through distributor turn-over or price erosion--eloquently condemns the economics of price maintenance.

certainty, but also on a recognition of the respective roles of the judiciary and the congress in regulating the economy. . . . Given its generality, our enforcement of the Sherman Act has required the court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute.

73 L.Ed.2d at 65.

See also Topco Associates, 405 U.S. at 609 n. 10 and 612-613 (concurring opinion of Justice Blackmun); Socony-Vacuum, 310 U.S. at 222; and Trans-Missouri Freight Association, 166 U.S. 340.

V

ARGUMENT:

EVEN A RECORD AS SIMPLE AS THAT
HYPOTHESIZED BY MONSANTO WOULD
CONTAIN SUFFICIENT EVIDENCE
FOR THE INFERENCE OF A
CONSPIRACY IN A RESALE
PRICE MAINTENANCE DEALER
TERMINATION CASE

A. A Jury Is Entitled To Draw Any
Reasonable Inference From The Evidence
Presented At Trial.

It is hornbook law that a jury is entitled to draw from evidence presented at trial any reasonable inference supported by that evidence. As long as reasonable minds can differ on the inferences to be drawn, the conclusion reached by a jury must be upheld. This is the essence of the jury's function--to select from amongst conflicting inferences, based upon the evidence presented, that which it considers most reasonable. A verdict reached in this manner must be upheld regardless of whether the court might consider different inferences or conclusions more

reasonable. See, Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944); and Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68 (1943). Moreover, a jury's conclusion can be based upon an aggregation of facts and events which, when isolated and viewed separately, may seem insignificant. See, Continental Ore. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696-699 (1962); and Gunning v. Cooley, 281 U.S. 90, 94 (1930). Since conspiracies are seldom capable of direct proof, such facts and events frequently serve as the circumstantial basis for the inference of a conspiracy. See, Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 612 (1914).⁴⁵

⁴⁵ No express agreement is necessary to prove a conspiracy; an illegal agreement may be inferred from all of the circumstances. See, American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

B. Even A Case Based On The "Three Neutral Circumstantial Facts" Posited By Monsanto Should Be Allowed To Go To A Jury.

Notwithstanding such settled law, Monsanto would have the decision below reversed because the Seventh Circuit allowed the jury to perform this very function. By describing the record in terms that bear little resemblance to the record set forth in Spray-Rite's brief, Monsanto hypothesizes a record simple in the extreme, and argues sufficiency of the evidence on that basis. Even that record, however, consisting only of the "three neutral circumstantial facts" posited by Monsanto,⁴⁶ would not justify the result sought by Monsanto.

If the record was truly as simple as Monsanto claims, consisting only of evidence that a manufacturer was concerned about resale prices, that dealers complained about another dealer's

46 Brief Of Petitioner Monsanto Company, p. 33.

prices, and that the dealer complained of was subsequently terminated, the evidence that was not presented would itself become evidence of the most convincing nature. See Interstate Circuit v. United States, 306 U.S. 208, 226 (1939).

For example, during the trial of a dealer termination case based on a claim of collusive resale price maintenance, a defendant manufacturer would have an opportunity to introduce substantial evidence to justify its termination of a dealer--if the termination was truly legitimate, i.e. based on an independent, unilateral decision pursuant to a suggested resale price program adopted in accordance with the clear requirements of Colgate and its progeny. A manufacturer would eagerly explain to the jury the business reasons for such a program, the manner in which it was adopted and implemented, and the manner in which the program was administered. It could thus

counter the inference of collusion by demonstrating the independent and unilateral nature of the decision making process pursuant to which the program was adopted, and the rationale for the program.

To rebut an inference of conspiracy being drawn from the fact of dealer complaints about prices, a manufacturer could present evidence establishing the manner in which such complaints were directed to it, e.g., whether they were unsolicited and discouraged, rather than solicited and encouraged, and whether they were ignored or routinely dismissed, rather than providing the basis for follow-up activities and communications with the dealer or others.

The inference of collusive termination could be countered with proof establishing entirely legitimate reasons for the termination. If, using Monsanto's examples, a manufacturer was

truly concerned with the degree of dealer promotion and service, the dealer's failure to perform satisfactorily could be demonstrated by reference to objective criteria and by comparison to the performance of other dealers. The inference that price cutting was the cause of the termination could be negated by proof of price structures and the extent to which other dealers cut prices without termination. The timing of the termination itself could be probative of the innocent nature of the termination. Was the dealer terminated immediately upon the manufacturer's gaining knowledge of the price-cutting, or did numerous meetings, consultations and visitations to induce compliance with the price maintenance program occur prior to termination?

Monsanto, however, would simply have the Court relieve a defendant manufacturer from having to present such

justifications to a jury. The ruling advocated by Monsanto would enable a manufacturer to avoid its obligations at trial by convincing a court that certain economic theories suggest that justifications might have existed which might have justified the termination. However, the substitution of a jury's inferences based on evidence presented at trial with judicial speculation regarding possible economic justifications which might have existed and which might have been presented during trial is an obvious distortion of the law.

VI
CONCLUSION

The Amici States respectfully submit that the decision below should be affirmed.

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